Revers. U.S. Appeal
Dismiss petitions

8 Wall

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~348.~~ 1114

WILLIAM H. REED, WILLIAM BARNES, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

No. ~~457.~~ 225

THE UNITED STATES, APPELLANTS,

vs.

WILLIAM H. REED, WILLIAM BARNES, ET AL.

APPEALS FROM THE COURT OF CLAIMS.

FILED DECEMBER 11, 1869, AND MAY 21, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 348

WILLIAM H. REED, WILLIAM BARNES, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

No. 457.

THE UNITED STATES, APPELLANTS,

vs.

WILLIAM H. REED, WILLIAM BARNES, ET AL.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimants' petition	1	1
Traverse by the Attorney General	8	4
Final judgment by the court	9	4
Application by the solicitor for claimants for the allowance of an appeal	10	4
Order of the court allowing the appeal	11	5
Application of the Attorney General for the allowance of a cross-appeal	12	5
Order of the court allowing the cross-appeal	13	5
Finding of facts and conclusions of law	14	5
Certificate	19	7

1 *Petition.*

In the United States Court of Claims.

WILLIAM H. REED, WILLIAM BARNES, GEORGE E. HAWLEY, E. H. BARNES, D. C. ADAMS, and J. W. REED
vs.
THE UNITED STATES. } 3094.

To the honorable the judges of the Court of Claims:

The petition of William H. Reed, William Barnes, George E. Hawley, E. H. Barnes, D. C. Adams, and J. W. Reed respectfully represent that they are all citizens resident in the city of Alton, State of Illinois; that on the 1st of June, 1865, and prior thereto, they were the owners of the steamboat "Belle Peoria," a side-wheel boat of light draught, but capable of carrying five hundred tons of freight, built at St. Louis in 1859, and being in good order and condition, and engaged in navigation on the Upper and Lower Mississippi and the Missouri Rivers; that on the 1st of June, 1865, while lying at her customary wharf, at the port of St. Louis, the said steamer was ordered and taken into the service of the United States by Colonel L. S. Metcalf, A. Q. M., at St. Louis, for the transportation of supplies to Fort Berthold, about seventeen hundred miles up the Missouri River; that in consequence of the great distance, the lateness of the season, and consequent danger from low water, as well as indisposition to withdraw their boat from her regular trade, petitioners made written protest against the taking of their said
2 boat; but the said boat, with her full compliment of officers and crew, supplies, &c., was, nevertheless, taken by the said Colonel Metcalf and despatched on the said voyage; that petitioners are advised that the outward trip was performed in safety, and after discharging cargo, &c., the boat started on her return to St. Louis, and had progressed about two hundred and fifty miles when, in a storm that occurred, the boat was blown aground, and, after repeated efforts, it was found impossible to get her off; that after a week of unavailing efforts to get off, until after a rise of water occurred, on the 31st of July, 1865, the officers and crew left the said boat in charge of one of the mates, one engineer, and three watchmen, made their way to the nearest military post, Fort Sully, where they reported the facts, and thence returned to St. Louis, reporting as before to Colonel Metcalf, as well as petitioners, and making formal protest; that in the month of August following, after the return of the officers and crew (with the exception stated) as aforesaid, Colonel Metcalf wrote to the commanding officer at Fort Sully to employ some half-breed Indians to watch the boat until spring, and thereby relieve the remainder of the crew, which was done, and, accordingly, they were relieved on the 10th of September, in pursuance of the said instructions, and they also returned to St. Louis; that early in the spring following, petitioners, supposing that a rise would soon occur, when it would be possible to get the boat off, they, on the 3d of April, 1866, despatched from St. Louis a party to the relief of said boat, consisting of James S. Ballas, captain; John Blader and A. W. Hardy, engineers; James Price, pilot; Michael Mooney, Thomas Spillman, and David Jeddry, ship-carpenters; and John Heinghoffer, cook, all employed by petitioners; that said party proceeded with all despatch to the place where said boat had been left aground, and, on their arrival, ascertained that only three days before their arrival the boat had been

destroyed, viz., on the 15th of April, 1866; that they found por-
3 tions of the wreck, and became satisfied, from what they saw and the information otherwise obtained, that the cable had parted and the boat had been destroyed by the breaking up of the ice; that the loss was total, it being utterly impossible to recover and save any portion of the boat of value, and the party returned to St. Louis on the 3d of June, 1866, and made report of the facts, and sworn protest accordingly; that subsequently a board of survey was convened by order of the United States officer commanding at Fort Sully, whose finding was substantially as above stated, and in accordance with the protest of the officers.

Petitioners further represent that for the employment of said boat, and expenses of officers, crew, &c., they received vouchers for a period of seventy and one-third days, at the rate of two hundred and seventy-two dollars per day—less private receipts for the period, amounting in the aggregate to two hundred and twelve dollars; that for the period from 10th of August till 30th of September, when most of the officers and crew had returned, they received vouchers at the rate of one hundred and one dollars per day, all of which vouchers were issued by Colonel L. S. Metcalf, A. Q. M., and were duly paid to petitioners; that additional vouchers for a period of sixty-one days, from 1st of October to 30th of November, were also issued to petitioners by Colonel Metcalf, at the rate of eighty dollars per diem, (all the crew then having left as stated,) amounting to the sum of four thousand eight hundred and eighty dollars, which vouchers were presented to the proper officers of the Quartermaster's Department for payment, but some objection was raised and, finally, they were presented to the Quartermaster General at Washington, who transmitted them to the Third Auditor of the Treasury, with his recommendation that they be disallowed, and the report of the Auditor and decision of the Second Comptroller thereon were, ac-
4 cordingly, adverse to any payment to petitioners on account of per diem. Copies of said vouchers are hereto appended, marked A.

Petitioners further represent that during all the period subsequent to the taking of said boat, and up till the loss thereof, they could have profitably employed her in her regular and legitimate trade; that so far as any compensation for the use of said boat has been paid them, it was fixed by the officers of the Quartermaster's Department, and was neither unusual nor excessive; that by implication of law, as well as the promises of the officers of the department, the government became and is liable for a reasonable compensation per day, from the time of taking the said boat until she should be returned, or, in case of loss, until the time when the loss happened. There is therefore due them for one hundred and ninety-seven days' service of said boat, which, at the amount allowed by the quartermaster, would be $15,760 due to the petitioners.

Petitioners further represent that said boat never was abandoned by them, nor by their order or consent; that the return of the officers and crew as stated was not an act of abandonment, nor so considered or understood by them or the officers of the Quartermaster's Department, nor by petitioners, but simply as an economical arrangement to reduce expenses when their services were not needed, as well as to avoid the winter's stay in a wild region, far beyond civilization, inhabited only by Indians, and without proper preparations and supplies for such a season; that it was confidently expected said boat would be got off in the spring, when the snows melted and the usual rise of water occurred; that it was in this view, and with this expectation, that the party was organized and sent to the place where the boat had grounded; that said

party consumed more than two months in making said expedition and returning, and were paid for their services, expenses of transportation, equipment, supplies, &c., involving an outlay of five thousand three hundred and thirty-five dollars, all of which expenses were paid by petitioners, as will appear by bills of expenses and receipts on file in the Treasury Department, and for which no reimbursement whatever has been made to petitioners.

Petitioners further represent that said boat was owned as follows: William H. Reed, one-eighth interest; William Barnes, one-eighth; George E. Hawley, three-sixteenths; E. H. Barnes, one-eighth; D. C. Adams, five sixteenths, and J. W. Reed; one-eight interest.

Petitioners further represent that they have at all times borne true allegiance to the government of the United States; that they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; wherefore petitioners pray that the court will take jurisdiction of their case, and that the amounts due them may be decreed to be paid.

WILLIAM H. REED.

R. J. ATKINSON, *Counsel for Petitioners.*

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Wm H. Reed, being duly sworn, says that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsetts; and that he believes the facts stated in said petition are true.

WILLIAM H. REED.

Sworn and subscribed before me this 29th day of January, A. D. 1868.

[SEAL.] N. CALLAN, *Notary Public.*

Post-office address of William B. Reed, William Barnes, George E. Hawley, E. H. Barnes, D. C. Adams, and J. W. Reed, Alton, Illinois.
R. J. Atkins, counsel, Washington, D. C.

6 A.

ST. LOUIS, MISSOURI, *November* 30, 1865.

The United States to W. B. Reed, DR.

October 1st to November 30, 1865:
For use and service of steamer "Belle Peoria," detained in the Missouri River, from October 1st to November 30, 1865, inclusive, being 61 days, at $80 per day..... $4,880 00
Boat paying all expenses, except subsistence of the guard*..

This boat was seized to transport government stores up the Missouri River, and is lying aground at a point near Fort Rice, D. T.

$4,880 00

I certify that the above account is correct and just, that the services were rendered as stated, and that they were necessary for the public service, as per my report of persons and articles for November, 1865.

(Signed) L. S. METCALF,
Br. Col. and A. Q. M

* NOTE.—Matter in pencil-mark on one of the duplicate vouchers: "Expense out, say $160 00," and "Guards, $10 00 per day." Who wrote these remarks does not appear.

Received at ———, the —— of ———, 186 , of ———, quartermaster United States Army, the sum of forty-eight hundred and eighty dollars and —— cents, in full of the above account.

(Signed) W. H. REED.

Signed in duplicate.

7 The foregoing petition was filed February 15, 1868.

8 In the United States Court of Claims.—December term, A. D. 1868.

WILLIAM H. REED ET AL. *vs.* THE UNITED STATES. } No. 3094.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimants in the sum of fifteen thousand seven hundred and sixty dollars, the said defendants say that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

9 In the Court of Claims.

WILLIAM H. REED & OTHERS *vs.* THE UNITED STATES. } No. 3094.

And now, to wit, first of March, A. D. 1869, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said William H. Reed, William Barnes, Geo. E. Hawley, E. H. Barnes, D. C. Adams, and J. W. Reed, claimants, have and recover of and from the United States the sum of two thousand and five hundred dollars no cents. ($2,500 00.)

By the court.

10 In the Court of Claims.—Dec. term, 1868.

WILLIAM H. REED & OTHERS *vs.* THE UNITED STATES. } No. 3094.

And now come the claimants in this case, by their attorney, and move

the court for an appeal from the decision thereon, made by this court on the 1st of March, 1869, to the Supreme Court of the United States, in pursuance of the statute in such cases made and provided.

R. J. ATKINSON,
Att'y for Claimants.

Filed in the clerk's office 24th May, 1869.

11 At a Court of Claims held at the Capitol, in the city of Washington, 24th May, A. D. 1869:

WILLIAM H. REED ET AL.
vs.
THE UNITED STATES. } No. 3094.

Ordered that the petition for appeal filed in this case, by the attorney for the claimants, be allowed.

By the court.

12 In the Court of Claims.

W'M H. REED ET AL.
vs.
THE UNITED STATES. } No. 3094.

And now, on the 26th day of May, 1869, the United States, by their Attorney General, ask that a cross-appeal in this case may be allowed to the United States in said case; an appeal having been allowed to the claimants in said case, and the decision in said case adverse to the United States being one which will affect a class of cases, and furnish a precedent for the government of some one of the executive departments of the government of the United States in such cases; also the amount in controversy being more than three thousand dollars.

T. LYLE DICKEY,
Ass't Att'y General.

Filed in the clerk's office, May 26, 1869.

13 At a Court of Claims held at the Capitol, in the city of Washington, 6th December, A. D. 1869:

WILLIAM H. REED ET AL.
vs.
THE UNITED STATES. } No. 3094.

Ordered that the petition for cross-appeal filed in this case by the Att'y General be allowed.

By the court.

14 *The finding of facts, and the conclusions of law on said facts on which the court founded its opinion.*

On the hearing of this case in the Court of Claims, the following ultimate facts were found in the case:

The claimants were, on the 1st day of June, 1865, the owners of a side-wheel steamboat called Belle Peoria. She was then lying at her

wharf in the city of St. Louis. The owners were applied to by Col. Metcalf, United States quartermaster at St. Louis, to take a cargo of military supplies to Fort Berthold, on the Missouri River, about 1,700 miles from St. Louis. They declined on account of the lateness of the season. He then ordered them to prepare for the trip, and informed them that in case of refusal the boat would be impressed. The owners protested, but, under the orders, got the boat in readiness, put on the cargo, and left St. Louis on the 3d day of June, 1865. She arrived at Fort Berthold on the 22d day of July, 1865, discharged her cargo, and started on her return trip on the 24th of the same month. She proceeded until the 26th, when a high wind sprung up, and she, in attempting to land, was blown aground. All efforts to get her off proved
15 unavailing. After making all the effort that was deemed advisable, and finding it impossible to get her off until a rise should occur in the river, the officers and crew left her, leaving several persons in charge. The crew left her on the 31st of July, 1865, leaving on board one engineer, one mate, and three watchman, who were to take care of the boat. The officer in command at Fort Rice also detailed and sent a military guard to protect the boat.

The facts being communicated to the owners at St. Louis, they made their protest in order to cover the insurance. The boat remained aground until about the 15th of April, 1866, when by an ice freshet in the Missouri River, she was swept off and totally destroyed. Captain Metcalf, on seizing the boat, fixed her per diem compensation at $272. She was paid at this rate until the 10th day of August, 1865, being the time when information arrived at St. Louis that she was aground and the captain and part of the crew returned. She was also paid from the 10th of August to the 30th of September, at the rate of $101 per day. This was while the engineer, mate, and watchmen remained on board. From the 30th of September until the 30th of November, 1865, vouchers were issued to the claimants at the rate of $80 per day, which have
16 not been paid. No vouchers were issued after that date. The amount of these vouchers, together with compensation at the same rate of $80 per day until the destruction of the vessel on the 15th of April, 1866, is claimed in this suit, being an aggregate of $15,760. On the 3d of April, 1866, the claimants dispatched a pilot and crew up the Missouri River from St. Louis to where the boat was aground, to get her afloat upon the rise of the river, and to bring her down to St. Louis. These persons arrived at where the boat had been aground, about the 18th day of April, 1866, and after the boat had been destroyed by the flood and ice. These persons were sent, after consultation with the quartermaster at St. Louis, and for the purpose of protecting the interests of the United States, as well as those of the claimants. The just and necessary expense incurred in these efforts to save the boat amounted to the sum of two thousand five hundred dollars.

After the destruction of the boat, the claimants applied to the Third Auditor, under the provisions of the act of 1849, and its supplements, for the payment of her value. This claim was allowed and her value, as of the time of her taking, June 1st, 1865, fixed at $30,000, and which
17 amount was duly paid to the claimants. The accounting officers rejected the claim for the per diem compensation from September 30th, 1865, until April 15th, 1866, when the boat perished, including the vouchers until November 30th, 1865. The accounting officers also rejected a claim for $5,401 41, alleged to have been expended in efforts to save the steamboat.

This suit is brought to recover the amount of these vouchers, and the

per diem compensation of the boat from November 30th, 1865, to April 15th, 1866, and also the alleged expenditure of $5,401 41, in efforts to save the boat, making together the sum of $21,161 41.

And the court find that the reasonable and just amount expended by claimant, with the knowledge and acquiescence of the quartermaster, to save the boat and prevent her destruction, was two thousand five hundred dollars. And upon the foregoing facts so found, the court were of opinion that the said claimants were not in law entitled to recover the amount of said vouchers up to the 30th of November, 1865, nor for the per diem compensation of the boat from November 30th, 1865, till the 15th of April, 1866, and that in respect of these claims, the petition should be dismissed and the defendants go thereof without day;

18 and that in respect to the claim for moneys expended in efforts to save the boat, the claimants are entitled to recover their just and reasonable outlay in that behalf, and judgement is rendered in their favor, against the United States, for the sum of two thousand five hundred dollars.

19 In the Court of Claims.

WILLIAM H. REED ET AL.
vs.
THE UNITED STATES. } No. 3094.

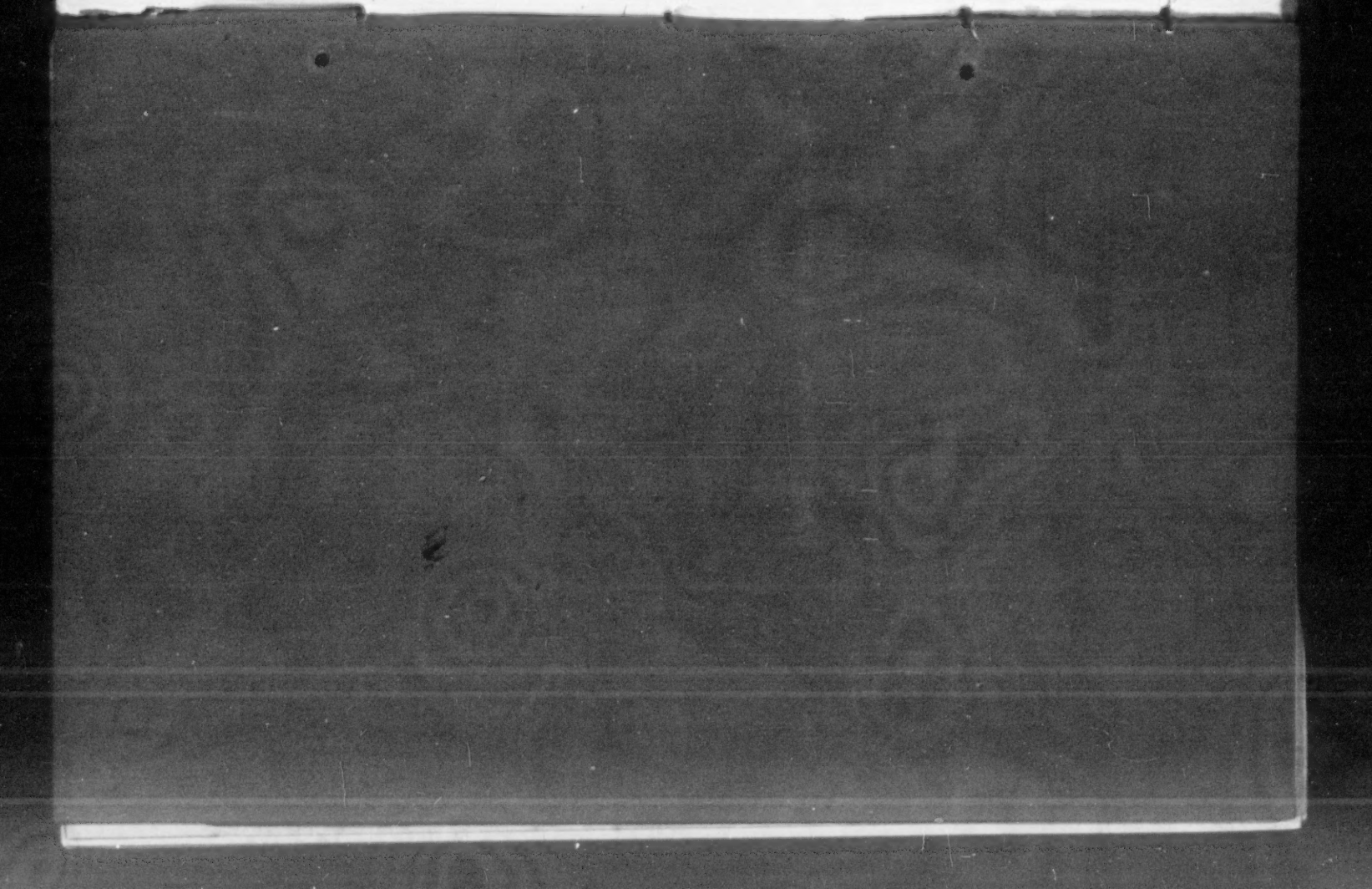
I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the claimants for the allowance of an appeal, as filed in the clerk's office 24th May, A. D. 1869, and of the order of the court allowing the same; of the application of the Att'y General for the allowance of a cross-appeal, filed in the clerk's office 26 May, A. D. 1869, and of the order of the court allowing the same; of the finding of facts and the conclusions of law on said facts, on which the majority of the court founded their opinion.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of December, A. D. 1869.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 348. William H. Reed, William Barnes, et al., appellants, vs. the United States. Filed 11th December, 1869. No. 457. The United States, appellants, vs. William H. Reed, William Barnes, et al. Filed 21st May, 1870. Court of Claims.



SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1870.

No. 144.—WM. H. REID, WM. BARNES ET AL., APPELLANTS, VS. THE UNITED STATES.

No. 225.—THE UNITED STATES, APPELLANTS, VS. WM. H. REID, WM. BARNES ET AL.

BRIEF FOR WM. H. REID AND OTHERS, BY WM. LAWRENCE.

This is an appeal from the Court of Claims.

The facts found by that court, on which the case is to be heard, appear in the record and need not be repeated.

In the Court of Claims the plaintiffs asserted a right to recover $15,760, compensation for the use and detention of their steamer Belle Peoria, from the 30th of September, 1865, to the 15th of April, 1866, and $5,401 41 for expenses incurred in the spring of 1866, in sending a crew from St. Louis up the Missouri River, to make efforts to return the boat.

These claims I will consider separately.

I.

THE RIGHT TO RECOVER—HOW IT ARISES.

The facts as found by the Court of Claims show, *either*,

1st. That the United States, through their quartermaster, on the 1st of June, 1865, impressed and took possession of the plaintiffs' boat and its crew to go, under the control and in the custody of the Government officers, to Fort Berthold, with an implied agreement to pay a reasonable per diem price for the use, service and detention of each until they were respectively returned to St. Louis, and the boat there safely restored to plaintiffs, *or*, (what is in legal effect substantially the same thing,)

2d. An agreement between the parties that the United States should have the control and services of the boat and crew to go from St. Louis to Fort Berthold and return, as soon as practicable, with a reasonable per diem compensation, until the Government restored the boat to the plaintiffs at St. Louis, including all time of delays by storms and grounding, or until the boat was lost.

The considerations which show this are unequivocal:

1. There is no evidence and no pretence that there was any agreement for freight or pay merely for an *outward trip*, nor for *distinct voyages* from place to place, nor for a *price per ton* or otherwise on performance of a voyage, nor to perform any voyage at all as a condition precedent to the right to pay, nor for pay only for any *limited time*. If, then, none of these contracts were made, the only other construction which can be

put on the facts is that which I have stated. This is practically conceded by the argument of the Attorney General, on page four of which he says:

> If any contract of hire binding on the United States could be implied, it would be merely a hiring for the voyage up the Missouri to Fort Berthold, with allowance, at most, of pay for a return trip to St. Louis, where other employment would be open to her.

If by this is meant with pay until the return trip *was in fact completed*, or by reasonable diligence might have been, or until it was rendered impossible, then I do not specially object to it. But if "*pay for a return trip to St. Louis*" can in justice be something *less* than for *all the time required to accomplish it*, or if it be short of the time when it became finally impossible by the destruction of the boat to return, then I am unable to comprehend what pay for a "*return trip*" means

The circumstances all show that the implied contract was, to pay for *a round trip*, which means all the time necessary to make it or until it became impossible.

2. From September 30, 1865, when the engineer, mate, and watchman left the boat, until destroyed by an ice freshet, April 15, 1866, she was guarded by a Government military guard detailed by the officer in command at Fort Rice.

Why was this if she was not under the control and in the custody of the Government? The object of this was, to return the boat to St. Louis the next spring.

3. The boat was blown aground July 26, 1865. Nearly all the officers and crew left her, reaching St. Louis August 10, because there was no hope of getting the boat off until the next spring, and it was desirable to save expense. Up to this time, from June 1, the Government paid the full per diem compensation of $272, fixed by Captain Metcalf, the quartermaster.

Why pay for this *part* of the return voyage if it was not agreed that all should be paid for and no matter how long it might require? The court cannot doubt but if there had been no delay in the return trip payment would have been made according to that agreement.

4. From August 10 to September 30, during which time one engineer, one mate, and three watchmen of the crew remained aboard, and the boat aground, payment was made at the rate of $101 per day. Here was a reduction in the per diem—a modification of the original contract—because nearly all the crew were discharged. Why was a reduced per diem paid? Still, because the agreement to pay until the boat returned to St. Louis continued. The payment on one side and its acceptance on the other is the contemporaneous construction of the arrangement between the parties, and they prove a continuous subsisting liability to pay.

5. From September 30 to November 30, 1865, quartermaster's vouchers were issued to plaintiffs, at the rate of $80 per day. The quartermaster was the officer charged with the duty of providing transportation, and his vouchers prove that his contract was a continuing one till the return of the boat. That arrangement could not be terminated, except by mutual consent—by the *aggregatio mentium*—and it never was until the boat was destroyed.

6. By the acts of March 3, 1849, and March 3, 1863, it is provided:

> That * * * any person who * * * shall lose * * * or shall have destroyed by unavoidable accident any * * * steamboat, * * * *while such property was in the service* (of the United States) shall be allowed and paid the value thereof *at the time he entered the service: Provided*, it shall appear that such destruction was without any fault or negligence on the part of the owner of the property, and while *it was actually employed in the service of the United States.*—(9 Stat., 415; 12 Stat., 743, sec. 5.)

The plaintiffs' boat was destroyed April 15, 1866. Their right to recover its value from the Government depended on the *fact* that it was *then* "*actually employed in the service of the United States.*" Under these acts the Third Auditor allowed the claim of plaintiffs $30,000 for the value of the boat as of the time of her taking, June 1, 1865, and the claim was paid by the Government. This allowance and payment necessarily found the fact that *the boat was actually employed in the service of the United States on the 15th April*, 1866, and the Government is now estopped from controverting that fact. If the boat was in the actual service that day it had been in like service during all the previous time, and the facts show it was in such service under contract for pay.

7. The brief of the Attorney General practically concedes the contract as I claim it. He says:

> The return voyage was broken up by the shipwreck; that is, at latest, when the captain and most of the crew, abandoning all hope of bringing the steamer to St. Louis *during the current season*, left her to lie aground *till the next spring*.

Here it is admitted there was no purpose to abandon the return voyage, but the purpose was to *resume it* as soon as practicable. All this was with the sanction of the Government, and the boat left in charge of Government officers and soldiers, to the end that the return trip might be completed next spring. The facts determined by the Court of Claims show that it "was impossible to get her (the boat) off until a rise should occur in the river."

Now, when the government agent, clothed with the power to contract, has given all these evidences of what the contract was, there can be no doubt what it is.

8. Need I refer the court to the effect of *contemporaneous construction* of the contract by the Government and its officers? The law is clearly stated in Broom's Legal Maxims, 608.

This is also rendered very clear by what is said in relation to the evidence of a *prima facie* right to recover.

MILITARY OFFICERS COULD CREATE THE LIABILITY.

There can be no doubt of the authority of the officers, civil and military, to make the Government liable to the claimants. Their authority for this rests on POSITIVE STATUTE, on COMMON MILITARY LAW, on ESTOPPEL, and on RATIFICATION by the government.

The court takes judicial notice that it has been the uniform usage of the Government, in accordance with well-settled law, to make compensation for the service of boats impressed by the proper military officer through the quartermaster in charge of transportation, from the time of seizure until the return of the boat to the owner.

The appropriation acts make appropriations to pay for such claims, and to them I refer as well as the acts regulating the service and officers.

The case of *Harmony* vs. *Mitchell*, 13 Howard, 134, is a leading case, determining the liability of the Government arising from the acts of military officers. Chief Justice Taney said:

> There are, without doubt, occasions in which private property may be lawfully taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular military duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner.

The Court of Claims, in *Grant* vs. *The United States*, 1 Nott & H., 41, said:

The taking private property for use or for destruction, when the public exigency demands it, by a military officer commanding any part of the public forces, is an exercise of the right of eminent domain. Whenever the officer is *justified, the Government is liable.* The state of the facts, as they appeared to the officer when he acted, must govern the decision.

The same court has decided that this exercise of authority is not a *tort, because it is authorized by law.* In *Straughan* vs. *The United States*, 1 Nott & H., Nott, J., said:

There is no such thing as a tort by a government against an individual. As between a citizen and his own government, acts which, between private persons, would be *torts*, are to be deemed *implied contracts, founded on the right of eminent domain*, or else acts unavoidable and necessary for the public welfare; but never acts founded upon a wrongful or malicious intent.

In *Curtis* vs. *The United States*, 2 Nott & H., 152, that court said:

The rule and principle adopted by the court for the administration of justice between a claimant and the Government is simply to give that measure of relief which the law would award, were the action between man and man.

The court never gives greater, and never gives discretionary relief. Sometimes this rule is modified by holding parties to greater care and vigilance than if they had dealt with private persons; but the liability of the Government in these actions, on contract, expressed or implied, has been held, generally, to be simply that which the claimant might pursue against another defendant in another tribunal.

In *Brooke* vs. *The United States*, 2 Nott & H., 184, the drugs of Brooke were seized and delivered to an officer of the Government, who applied them to its use in the military hospitals. Peck, J., said:

As between individuals, these circumstances would justify a recovery of the value of the goods; so should they as between an individual and the Government.

Here the boat of plaintiffs was applied to the use of the Government, and detained through the agency of its officers.

Congress has made appropriations to pay judgments so rendered, and these decisions have now become *a rule of property* or a *rule of determining rights.*

By the common military law and usage older than the Government, recognized in all countries, the proper military officer has the power, by unwritten law, to make the Government liable for military supplies like this.

The authorities already cited show this.

Executive officers can do many acts for which there is no statute. *United States* vs. *McDaniel*, 7 Peters, 2.

The War Department was charged with the duty of furnishing supplies to the soldiers in the forts and frontier posts of the Government.

It was necessary to take the boat of plaintiffs to execute this power. It was essentially a war power to relieve the soldiers of a fort in a hostile Indian country nearly two thousand miles above the mouth of the Missouri River.

Whiting, in his work on the war powers of the President, says:

That the property of any citizen may, under certain circumstances, be seized in time of war by *military officers* for public purposes, is not questioned, just compensation being offered or provided for.—P. 26.

This power is recognized in *Brown* vs. *The United States*, 8 Cranch, 123.

The boat was seized, if not *flagrante bello*, yet *non dum cessante bello.* A "*state of war*" continued, and the war power was not then limited to any locality.

United States vs. *Anderson*, 9 Wallace, 56.

This power arises from, is inherent in, and is therefore authorized by, the acts of Congress organizing the Army and the Quartermaster's Department.

Then, also, the act of March 3, 1849, *expressly* provides for this case. It, in so many words, gives a right to recover for any boat—

destroyed while actually employed in the service of the United States, *either by impressment or contract.*

This authorizes or recognizes impressment, and, by implication, the liability to pay for services under impressment.

ESTOPPEL.

If the plaintiffs did not resist the right to employ their boat, the Government cannot, after the fact, deny their liability for so doing. This principle rests upon, not only the *doctrine of estoppel*, but on the maxim that no party can "take advantage of his own wrong." The law of estoppel is clear.

But the estoppel here is the more clear upon the facts hereafter referred to.

A PRIMA FACIE RIGHT TO RECOVER—ESTOPPEL.

But there is another ground upon which the plaintiffs are entitled to recover.

Their claim for use and service of the boat detained by the Government from September 30, 1865, to April 15, 1866, is $15,760.

For a part of this time—September 30 to November 1, sixty-one days, at $80 per day, in all $4,880—the plaintiffs hold the quartermaster's vouchers, showing the amount correct and just, and necessary for the public service.

Now, as a question of law, the quartermaster's voucher is *prima facie* evidence of a right to recover for the sixty-one days; and there is a *prima facie* right to recover for the residue of the time, because the *same circumstances* existed to give the right. The quartermaster acted under the authority of the proper military officer. This sufficiently appears as a question of *fact*, and is *presumed* as a question of law. *Wilcox* vs. *Jackson*, 13 Peters, 498; *United States* vs. *Cutler*, 2 Curt., 617; 5 Cr. C. C., 619; 1 How., 290.

This *prima facie* right has become a *rule of property* well established.

In *Parish* vs. *The United States*, 2 Nott & H., 344, Peck, J., said:

We think where it is shown, as it is in this case, that a person notoriously acts as an agent or officer of the Government about the duties connected with his station, under the observation of his superiors, and recognized by them, the Government receiving the benefit of his services *without objection*, should not be permitted to *repudiate his vouchers;* but that these should be held, when given within the scope of his ordinary duties, as *prima facie* evidence that their statements are true.

Again, the same court said:

Where there is no evidence of fraud none can be presumed. *Richards* vs. *The United States*, 2 Nott and H., 500. And see *Parish* vs. *United States*, 1 Nott & H., 341.

The payment by the Government of some of the quartermaster's vouchers, and finally for the boat itself, is a ratification of the acts of its officers in all that was done.

THE LIABILITY, WHETHER BY IMPRESSMENT OR EXPRESS CONTRACT, EQUALLY VALID.

The authorities cited show that the liability by impressment creates an implied contract, enforced also by an estoppel, so that whether the liability here grows out of an impressment or a charter-party, it is equally *ex contractu*. And in either case the Constitution, in express terms, imposes the obligation to make "just compensation."

THE AMOUNT OF THE RECOVERY.

The quartermaster's voucher is *prima facie* evidence of the per diem the plaintiffs should recover. It is evidence of a *quantum meruit*. The law implies a contract to pay a *quantum meruit*.

Comyn on Contracts, 4; 6 Wheaton, 135; *Williamson* vs. *Barret*, 13 Howard, 101; *Sturgis* vs. *Clough*, 1 Wallace, 269.

THE PLAINTIFFS NOT CHARGEABLE WITH NEGLIGENCE.

There is no fact in the case to show, and no pretense, that there was any fault or neglect of the boat's crew or officers, which delayed the return trip to St. Louis. Fault or negligence, like fraud, will not be presumed. But they are actually disproved, because the statute does not permit payment for the boat when there has been fault or negligence; and the proper officers of the Government found that there was no fault or negligence, and paid for the boat. This estops the Government now.

Now, upon the facts in this case, upon every principle of *justice* and of *law*, the plaintiffs are entitled to recover.

THE JUSTICE OF THE CLAIM.

The justice of this claim is clear. The court takes judicial notice of climate and rivers. The court know that the plaintiff's boat could have navigated the rivers south of St. Louis, and it is presumed would have earned freight from September 30, 1865, to April 15, 1866. The plaintiffs, when applied to by the quartermaster, on June 1, to go from St. Louis, 1,700 miles up the Missouri River, to Fort Berthold, "declined on account of the lateness of the season." They knew that the treacherous sands of the Missouri, and hazardous gales and receding waters, would probably, as they did, leave them aground for the winter, and deprive them of safer trade, and pay which required no quartermaster's vouchers, no auditor's adjustment, no Court of Claims, no lawyer's fees, and none of this almost endless delay.

And having been deprived of the winter's trade in milder waters, and of speedier pay, why should they not now be paid, as the Constitution requires, "just compensation" for all the time their boat was detained by reason of what the Government officers did?

They only ask that compensation which they could have earned elsewhere. Why should they not have it?

They only ask for compensation for time during which the Government has *admitted* their boat was "*actually employed in the service of the United States.*"

As a question of *public policy*, the Government is interested in securing confidence in its purpose to pay all just demands.

Are authorities needed to show that where there is a plain contract for pay, it should be performed?

II.

THE DEFENSE—REPLY TO IT.

I will now notice the grounds upon which the brief of the Attorney General denies the plaintiffs' right to recover.

I. OBJECTION TO RECOVERY.

His first objection is that—

No valid contract on the part of the United States to pay any hire of this steamer is shown.

The contract has already been sufficiently shown.

When plaintiffs gave over their boat and crew, or permitted them to be taken and detained by the quartermaster, the law implied a contract to pay "just compensation" for all the time so detained.

Even if the facts show only a seizure of the boat for an outward voyage and return to St. Louis, it would cover all the time to make a return possible, or until, by the destruction of the boat, it became impossible.

The authority of the quartermaster is not denied. His acts were both *authorized* by law and *ratified* by the Government.

II.—Objection.

The Attorney General says:

> If any contract could be *implied*, it would be a hiring for the voyage to Fort Berthold, with allowance for return trip to St. Louis.

This has already been briefly noticed.

The plaintiffs seek to recover pay, not for a full *return trip*, but for that portion of time occupied in a return trip until any further return became impossible by the final destruction of the boat.

The Attorney General says: "This contract has been more than fulfilled by the Government."

How? Has the Government paid for a return trip? Certainly not, but only until the officers and crew found the boat could not, during the fall of 1865, finish the return trip, and left her in charge of a Government guard, September 30, 1865, intending to return as soon as practicable next spring to complete the return trip.

Why should the pay stop *on that particular day?*

III.

The third and last general head of objection to the right of recovery is that—

> The return voyage was broken up by the shipwreck.

The shipwreck was April 15, 1866. I agree that did break up the return voyage; here is an admission that it was not broken up until that time. The plaintiffs ask pay only up to that time; the contract subsisted up to that time, and why shall plaintiffs not recover on it?

Objection III. (*a.*)

(*a.*) It is said:

> The steamer was rendering no actual service to the United States on her return trip.

And it is said (*c*) that the plaintiffs are "suing to be paid her hire for over six months while she rendered no service."

A return trip is *service*; it is a *consideration* for a contract, whether beneficial to the United States or not; it was service at their request and by their order, and that gives a right to pay. It was service under a contract for pay *until the return voyage was completed* or rendered impossible, no matter what obstacles might delay the return. A delay for a night, occasioned by darkness, would not defeat a recovery; neither would a delay of a week, by fogs, nor a longer period, by grounding, equally with darkness or fogs, causing unavoidable delay, with no actual service beneficial to the Government.

Objection III. (*b.*)

(*b.*) It is said again:

> Her (the boat's) value was paid for as of the day when she was first taken into the service of the United States, namely, June 1, 1865.

If this proves anything by way of defense, it proves too much. If it defeats a right to recover for the use of the boat, for any part of the time, it would defeat the right from the 1st of June, 1865, and that is not pretended. What law or rule fixes the date of July 31, or August 14? Several considerations will show this payment does not affect the right to pay for the use of the boat.

1. It is not necessary to inquire what right the common law would give to recover the value of a boat destroyed under the circumstances, or what date it would fix to ascertain its value. The statute fixed the rule and the time for the United States.

It provides for payment, and the *time* of the valuation is when the boat "*entered the service.*" (Act 3d March, 1849, 9 Stat., 415, sec. 2.)

It might have adopted the value of the boat *when built* or *when destroyed*, but it did not. But the statute does not say that this shall *defeat the right for services* rendered *before the destruction.* The Government pays *for this boat*, because of its *loss;* it is not for the services it has rendered. The statute fixed this time of determining the value, for reasons which were deemed sufficient, and it is not for the courts to give this fact an effect which the statute has not assigned to it. But it can make no difference as to the right to recover for the services of the boat, whether its value is determined as of the beginning, or middle, or end of the trip.

This fact, it is to be presumed, was taken into account when fixing the amount of the *per diem* pay for boat, and it was of course fixed less in consequence of it.

2. There was a *contract to pay for the services of the boat during all the time she was detained*, as I have shown, and the plaintiffs rest on that. The *obligation* of this contract cannot be *impaired*. It is no part of the statute and no part of the contract that the rights the contract gave should be impaired by payment for the value of the boat. And no reason at common law is suggested in the brief of the Attorney General to show how a payment of the *value*, made according to law, can satisfy not only *that claim given by law*, but *another claim* for use and detention of the boat, given also by *contract* and by *law*. Satisfaction of *one claim* is not satisfaction of *two*.

The objection I am now considering is a little more fully stated in the opinion of the Court of Claims, (4 Nott & H., 137:)

> The United States, under the acts of Congress, stood in the relation of insurers of the property to the claimants. They have fulfilled that obligation by paying for her loss and destruction. When they did so it related back to the commencement of the accident and continuing peril by which she finally perished. They are not liable to *demurrage* in the mean time.

I respectfully submit this paragraph is full of errors of fact and law.

I am not surprised, therefore, that the brief of the Attorney General advances no such grounds as these; but I will show—

1. The United States did *not* stand "in the relation of insurers," or if they did, still the plaintiff's claim is valid.

2. That the payment for the boat could not, in fact or in law, "relate back," or if it could, the plaintiff's claim in the mean time is valid.

3. That the grounding of the boat was not in fact or in law "the *commencement* of the accident and *continuing* peril by which she finally perished," or if so, the plaintiff's claim still is valid.

4. That, in fact and in law, there is no *demurrage* to be liable for, or if so, the claim for it is valid.

Now, as all these positions are necessary to sustain the Court of Claims, if *any one* of them is wrong their judgment must be reversed.

I.—THE UNITED STATES IN THE RELATION OF INSURERS.

A.—THEY WERE NOT SO.

The *reason* assigned by the Court of Claims for holding that the payment for the boat *related back* and defeated the claim for services is that—

> The United States, under the acts of Congress, stood in the relation of insurers of the property to the claimants.

But the United States did *not* stand "in the relation of insurers."

The act of March 3, 1849, (9 Stat., 415,) provides that—

> Any person who shall have *destroyed* by unavoidable accident any boat while actually employed in the service of the United States, without any fault or negligence on the part of the owner, shall be allowed and paid the value thereof at the time he entered the service.

The United States are not liable for the boat unless it is *destroyed*. I care not whether this means "actual total loss" or "constructive." (1 Parsons' Marine Ins., 68–108, *Walker* vs. *Protective Ins. Co.;* 29 Maine, 317; Arnold on Ins., 990.)

But an insurer is liable for a partial loss. (2 Parsons, 377.)

This liability of the United States has but a single element of the relation of insurance—the liability for a total loss.

This is not insurance—it is indemnity for loss in a given case, with but one of the attributes of insurance.

The act of March 3, 1849, did not fix a liability for a *constructive* total loss. It never was designed that the United States should be, as insurers are, charged with the duty of taking care of boats only partially destroyed, and becoming their owners to repair, manage, or sell. It would be against policy to adopt such a construction of the statute.

The statute is not to be extended by construction. It creates a liability not known at common law, and in all such cases the rule of strict construction applies.

The law has provided no officer of the Government to receive notice of abandonment, or to take care of or dispose of damaged boats, or wrecks transferred to it by abandonment.

B.—IF THE UNITED STATES STOOD IN THE RELATION OF INSURERS, THAT DOES NOT DEFEAT THE CLAIM FOR SERVICES.

There is no reason or force in the position that if the United States stood in the relation of insurers and paid the loss, therefore the right to compensation under a contract is extinguished.

The payment for a loss by an insurance company does not affect a charter-party, or a hiring for use. Rights under one contract are not extinguished by duties performed under a statute which neither in terms nor by implication gives them any such effect.

In this case, if the boat had returned to St. Louis without interruption, though the low water, or an accident to a wheel, had rendered a tardy voyage of months necessary, it is clear no one would have denied the right of plaintiffs to pay for every day.

If the delay had been only a week or a month, and the voyage completed, the right to pay would not be doubted. If, in either case, the boat had been accidentally destroyed in going into St. Louis, at the completion of the trip, but still (to use the language of the act of March 3, 1849) "*while actually employed in the service of the United States,*" the right to pay for the whole time the boat was so in service could not be denied.

If an insurance company had paid the loss, and, by the terms of the policy fixing the value, as of the day the outward voyage commenced,

on what principle would that relieve the United States from paying the wages of the boat "while actually employed in the service of the United States?" And if payment by an insurance company would have no such effect, how could payment by the Government have any different effect? On this subject I adopt, as part of my argument, an extract from the opinion of the Comptroller of the Treasury of the 27th of October, 1866, on one of the vouchers for which we now sue. He said:

In *leaving the claimant to seek his pay or remedy upon this voucher*, I will, however, add that the *Government, having had an election to declare the boat a wreck and lost*, and *thereby entitling the owners to immediate payment for its value*, and to be *released from all further care or responsibility*, &c., or to *consider* her *only temporarily aground*, and therefore *detained from the owners*, and *on pay in Government employment;* and having chosen the latter course, and made payment, and *issued this voucher* in pursuance of such action, and *which was accepted and relied upon by the owners*, and all in *good faith*, I have *no doubt* but that the *claimants are legally and equitably entitled to pay on the voucher.*

Had *the boat been a conceded known wreck and loss at the time, the case would have been different, and the pay should have been stopped the moment such loss was conceded, and the liability of the United States for the loss fixed.*

But in *this case, we find the chief quartermaster at St. Louis fully apprised of the actual condition of the boat*, by the report of Colonel Metcalf, acting quartermaster, on the *13th November*, 1865, and yet it was not declared and conceded as *a wreck*, and *dropped from* further pay.

And in this connection I call the attention of the court to what is said in 2 Parsons Marine Ins., 110, hereafter quoted.

And again, the Comptroller said that if the officers of the Government had—

declared the boat out of service * * when he (the captain) reported at St. Louis, or when the remainder of the crew arrived at that point, and notified the owners that they would *no longer be entitled to pay, it would have left them free to adopt such measures* as might have been *possible for its safety or recovery*, or *perhaps sale;* or to have *abandoned* it to the *underwriters;* and it would also have left them free to seek *other employment for themselves and their capital.*

But instead of this the Quartermaster's Department went on paying for the use of the boat, as in Government employment, up to the 1st of October. * * * Under the circumstances of the case, and in the absence of all suspicion of fraud or collusion, was not this action of the Quartermaster's Department fully within its province and authority, and had not the claimants a reason and a right to rely upon it, and may they not legally and equitably insist that it shall be carried out in good faith, so far as it affects their fixed compensation? I am constrained to think so. Instead of dropping the boat, and declaring it out of service, and leaving the owners to their own responsibilities, resources, and remedies, it was *retained* under the *original arbitrary impressment*, and *continued on pay*, and *regular vouchers issued* as above narrated, and *at rates fixed by that Department.* Private property cannot be taken for public use without just compensation. The whole proceeding was *arbitrary*, and to which the *owners had to submit*, and *good faith and public policy* demands that *this arrangement for the compensation be carried out*, unless some legal and equitable reason can be given to the contrary.

* * * * * * *

On the *opening of the river* they seem to have *acted promptly* and *energetically*, having sent up a crew and incurred expenses to the amount of over five thousand dollars.

II.—PAYMENT FOR THE BOAT COULD NOT RELATE BACK.

The doctrine of relation.

But this payment for the loss is said to *relate* back. Now if it relates back it must accomplish something by it. The Court of Claims say the United States "are not liable for demurrage in the mean time," evidently meaning by *demurrage* pay for the time the boat was aground. Now if there had been no payment for the loss there would have been no relation, and the right to the so-called *demurrage* would not have been cut off, but would have been a valid subsisting claim. This so-called demurrage is a valid claim—a *vested right*—which according to this theory *could have been recovered if the plaintiffs had made no claim for the loss of the boat.*

But it is said the doctrine of *relation* defeats them.

If they had sued for the so-called demurrage without making a claim for the lost boat they could have recovered a judgment. That would have been a vested right. The money received on it would be a vested right.

Now as the controverted demurrage (so called) is only $15,760, and the value of the boat was $30,000, the payment of the $15,760 could not extinguish the right to the larger sum of $30,000.

If, after judgment for demurrage paid, the plaintiffs had sued for the boat, there could have been no reduction, for the statute fixes the value of the boat, as the amount the plaintiffs shall recover without reference to questions of demurrage.

And when the plaintiffs should recover under the statute for the value of the boat, would the payment of it *relate* back and divest the right of the plaintiffs to the demurrage money in their pockets, or if not paid to their judgment, or if not in judgment to their claim for it? The law says not.

Broom, in discussing the doctrine of *relation*, says it is *fictio juris*, but will not—

be raised so as to operate to the detriment of any person, as in the destruction of a lawful vested estate, for *fictio legis unique operatur alicui damnum vel injuriam.* The law does not love that rights should be destroyed, but, on the contrary, for supporting them, invents notions and fictions.

In Abbott's National Digest I find relation of "deed to title bond," I, 12; "of deed to time of date," II, 112; "of bond to date," I, 333–345: "of successive adverse possessions," I, 55; "of appeal back to terms," I, 136; and so of other titles in other works.

It has been shown that on and up to April 15, 1866, the boat was in the actual service of the United States under a contract for pay. Now, a contract, and money due on it, cannot be cut off by *relation*. A payment for the boat could not relate back while it was in service.

In none of the authorities do I find it said that where there are two independent contracts, one for the hire of a boat, and one for insurance against loss, neither having any relation to the other, the payment of a claim arising on one relates to and satisfies another and itself besides.

The enunciation of that law has been reserved for the Court of Claims, and in view of the difficulty of a question of so much magnitude, disposed of in so few words by that court, it is not strange that the court were divided in opinion.

There are difficulties in this new application of the doctrine of relation.

Suppose the boat had been impressed or served under contract for five years or until destroyed, with pay not due until service ended, and with knowledge that at the end of the time she would be of but little value. In such case, as in the case now under consideration, it is to be presumed the compensation would be fixed less, because of the liability of the Government, in case of loss, to pay the value of the boat at the time she entered the service. But in five years the services of boat and crew might and would be more than the value of the boat. The day before the five years expire, the boat is destroyed. The Government pays her value as of the date she enters the service. Certainly the payment cannot relate back to prejudice the right to recover for services, and satisfy a larger claim by the payment of a smaller one! And, if not, how can it relate back in any case?

The Court of Claims say the payment in this case "relates back to the *commencement* of the accident by which the boat is finally destroyed." Syllabus, p. 133.

In the case I put of the five years' contract the final destruction of the boat the day before the expiration of the five years might have resulted from an accident *commenced and operating* all the time from a day after the service began. And yet if payment relates back to the *commencement* of the accident, the whole five years' service, greater than the value of the boat, could not be recovered! This rule will not stand the test of examination.

The error consists in giving the payment any effect upon an independent *vested right*.

In this case the boat was just as much *in service after* as before the accident commenced.

The only case where payment for a boat relates back is where that effect is given to it by express contract.

The Third Auditor, in a report on the *per diem*, said that if the boat had—

> been chartered with an *accruing clause*, the Government could have taken her before or after the loss at the valuation, getting a credit on the same for the service money paid, less the usual deductions made for repairs.

But as she was *not* chartered *with an accruing clause*, there was no right on the part of the Government to take the boat at all, and so there could be no abandonment, no *relation* back of payment, and no termination of the *per diem*, until the boat was destroyed.

This "accruing clause" is one unknown to the *lex mercatoria*. During the rebellion, after the naval expeditions of Banks, Butler, and Burnside, it was found that the *per diem* charge of boats became very expensive, sometimes exceeding their value. To avoid this, the Quartermaster's Department invented the "accruing clause," and it was inserted in many charter-parties, as follows:

> And further, if at any time during the continuance of this charter, the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a *net* profit of — per cent. *per annum* on the original appraised value) shall apply on account of the said purchase.

Now in this case the parties contracted with a knowledge that the practice was to pay a *per diem* during the whole service, or until the boat was destroyed, unless there was a special contract otherwise. And as no such provision was made to save the Government, it cannot now be interpolated by the courts.

II.—THE EFFECT OF THE GROUNDING OF THE BOAT ON THE CLAIM FOR SERVICES.

Another ground upon which it is claimed that the payment for the boat "*related back*," is that the grounding of the boat was the—

> commencement of the accident and continuing peril by which she finally perished. (4 Nott and H., Court Claims, R. 137.)

The importance of the question whether the grounding of the boat was a "*continuing peril*" by which she was destroyed, I suppose, is that it will be insisted that the moment the liability of the United States is fixed for the value of the boat, the wreck became the property of the United States, and liability for her services must cease; that the Government must not be held liable for the service of her own property.

I claim:

1. That the grounding of the boat was not the proximate, nor even remote cause which destroyed her.

2. But that if it was, the liability of the United States was not fixed until the destruction was complete.

3. That even if an inchoate and contingent possibility of a liability existed, the plaintiff's claim for services, in the mean time, is valid, both by implication of law and by express agreement or understanding.

The facts found by the Court of Claims are that the boat, on her return trip, was blown aground July 26, 1865, and that—

> The boat remained aground until about the 15th of April, 1866, when, by an ice freshet in the Missouri River, she was swept off and totally destroyed.

The ice freshet, then, was the *proximate*, and really the only cause of the loss.

The grounding was a *peril*, but *it* did not *continue*, for the boat was "*swept off*" from her grounding peril, and a totally *different peril* finally, and after the termination of the grounding, destroyed her.

They may have been *successive* or *cumulative* perils, but the grounding was in no sense a continuing peril, which finally destroyed the boat.

If the claimants had sued the United States and averred a destruction of the boat only by the *grounding*, the evidence would not have sustained the allegation. The *allegata et probata* would not have corresponded.

But if the act of March 3, 1849, is to place the United States "in the relation of insurers"—a most dangerous doctrine for the United States—still, on the principles of insurance law, the *grounding* did not make a "constructive total loss," which fixed the liability of the United States. This is plain.

I have shown that the Government has already decided that the boat was in the actual service of the United States on the 15th April, 1866, and there could be no constructive actual loss before that.

By the common insurance law, the grounding was not a constructive total loss.

Parsons says:

> So stranding, which means the being cast on shore, may or may not be an actual total loss. The mere fact that she (the boat) rests on land or rock, and at low tide is high and dry there, does not, of itself, constitute this total loss; for the next high tide may lift her from the bottom, and if it cannot do this without assistance, it may be practically possible to use means to draw her off. (2 Marine Ins., 72.)

In *Patrick* vs. *Commercial Insurance Company*, (11 Johns, 9,) C. J. Kent said:

> It is well understood that stranding is not *ipso facto* a total loss.

So in *Peele* vs. *Suffolk Insurance Company*, (7 Pick., 254,) Parker, C. J., said:

> The mere stranding, however perilous, is not of itself a total loss, for the vessel may be relieved, and the damages may be small.

And Parsons says in that case "the vessel *was* got off and repaired," and he cites numerous authorities on this subject. (2 Marine Ins., 72.)

As the mere *stranding* was not a total loss, in law or fact, it could not be made so by relation by subsequent payment.

If the United States were (1) really insurers, and (2) had any officer authorized to receive an abandonment, and if (3) one had been formerly made, and if (4) it had been accepted, then, and only then, a mere stranding could be made a total loss. Parsons says:

> But if he (the assured) makes one (an abandonment) when the insurers are no bound to accept it, and they do not accept it, the abandonment has no effect whatever; but the insurers may accept any abandonment made to them, and, if they choose to accept an abandonment which they are not bound to accept, by such acceptance they make it valid; and they must then settle the loss as a constructive or technical total loss. (2. Marine Ins., 110.)

The finding of facts on which this case is now being heard does *not show the destruction of* the boat by the grounding; nor any facts which would justify an abandonment as for total loss.

The date and fact of the liability of the United States is only fixed by the *proximate* cause of the loss—the ice freshet of April 15, 1866.

This is the reasonable rule as against insurers on a policy, and is certainly so as to the United States, under the act of March 3, 1849. (2 Parsons, Marine Ins., 108 n., *DeBlois* vs. *Ocean Ins. Co.*, 16 Pick., 303.)

Suppose, in this case, the contract had provided that in no event should the boat be continued in service longer than April 1, 1866, by the very terms of the law the United States could not have been held liable for the destruction of the boat on the 15th of April, because the boat was not then destroyed.

There was then no liability for the boat fixed until April 15, and if not the liability for services continued to that time; payment for the boat could not relate *back of the time when the liability existed*. But even if the *liability* for the boat was fixed by the *fact of grounding, still a liability for the time of the boat between that and the ice freshet might and in this case did exist*. It is competent for the parties in interest so to agree, and they did so. All the facts show this.

Upon the theory that the United States "stood in the relation of insurers," they would by insurance law *become the owners of the boat in peril*, as Parsons says, to—

> Indemnify themselves as far as possible from the value thus transferred to them. (2 Marine Ins., 108.)

And none of the parties intended this, as is apparent from the evidence. No law provided for the custody or sale of boats so acquired by the United States. Provision would have been made for this if the law was designed to give to the United States the relation of insurers.

It would be a hazardous duty for the courts to devolve on the United States.

Very nearly connected with this subject is

THE QUESTION OF ABANDONMENT.

Neither in the brief filed in the Court of Claims, nor in the brief now filed by the Attorney General in this court, is any question made of any abandonment of the boat or voyage.

But the majority opinion of the Court of Claims says:

> We do not think the United States were liable for *per diem* compensation of the boat after the claimants abandoned her aground in the river, and, especially after they made their protest on the 14th of August, 1865.

The only facts on the subject of protest before *this* court are that—

> The crew left her (the boat) on the 31st of July, 1865, leaving on board one engineer, one mate, and three watchmen, who were to take care of the boat. The officers in command at Fort Rice also detained and sent a military guard to protect the boat. The facts being communicated to the owners at St. Louis, they made their protest *in order to cover the insurance*.

Now, the *abandonment* referred to by the Court of Claims must either be a *refusal to permit the United States to retain the use of the boat for the voyage*, or an *abandonment* under the law of insurance, where the assured notifies the insurer, by protest or otherwise, that the boat is a total, or constructive total loss, and claims pay for her. Neither of these can exist here. It has been determined by the payment for the boat that on the 15th April, 1866, she was in the actual service of the United States, and there could be neither kind of abandonment prior to that—there could not be service and abandonment of service at the same time.

The first position is not claimed by the defense, or if so, with no evidence to support it.

The right of the United States to detain or have the use of the boat aground was never disputed or interfered with, and the crew only left as a matter of necessity or economy, and then with the assent of the United States officers.

The abandonment which is relied on is that under the law of insurance, and which is relied on as evidence of an abandonment of the voyage. If, as I have shown, the United States did not stand in the relation of insurer, then there is no question of abandonment as to them. But if they did, then I say there was no abandonment in *fact*, and none in *law*, neither to any *insurance company*, nor to the *United States*.

When the protest was made does not definitely appear, but it was made "in order to cover the insurance"—not against the United States, but under a supposed or real policy of insurance. What amount of loss, or for insurance against what does not appear. No claim was ever made under this protest. How that can affect the claim for the services and detention of the boat no one has ventured to tell us.

There is no law for a protest against the United States, and if made it could not change their *actual* liability and the *real* intention of the parties interested. The evidence shows that in fact there was no abandonment.

The boat was blown aground July 26. Then, as the facts show—

> All efforts to get her off proved unavailing, and finding it impossible to get her off *until a rise should occur in the river*, the crew left her on the 31st July, 1865, leaving on board one engineer, one mate, and three watchmen *to take care of the boat*.

The engineer, watchmen, and mate remained on board until September 30. The United States officer in command at Fort Rice detailed and sent a military guard to protect the boat, and they remained until her destruction. The officers left with the *assent of the Government*, as an economic measure to save the useless expense of a crew.

Then the facts before the court show that—

> On the 3d of April, 1866, the claimants dispatched a crew up the Missouri River, from St. Louis, to where the boat was aground, to get her afloat upon the rise of the river, and *to bring her down to St. Louis*.

"Down to St. Louis" for whom? For the United States? No; as the property of, and for these plaintiffs. Here is the highest evidence that there never was any intention to abandon the boat. Neither the United States nor any insurance company ever took or held the boat *as theirs;* never accepted any abandonment, and *never were asked to do so.* If they had been, there would have been a demand for pay for her value; but none was made until after her final destruction.

There was no abandonment in law. This I have already discussed *supra*.

No protest or notice was ever served on the United States, nor in fact on any insurance company; nor was any demand made on the United States for pay for the value of the boat until after she was destroyed. But the protest, as affecting rights under a policy of insurance, against an insurance company, was at most only *precautionary;* and a mere precautionary measure, never perfected or pursued, cannot establish any right under a policy, much less under another contract.

I will not say the fact was, but I may say it might have been, that an insurance policy was about to expire, and the protest was a matter of abundant caution. But a protest, as against an insurance company, could not divest a claim on another contract with the United States.

Bouvier's Dictionary, title "Abandonment," tells us that an abandonment—

> is the act by which the insured relinquishes to the assurer all the property to the thing assured.

But to be effectual for *that purpose* it must be—

explicit and absolute, and must set forth the reasons upon which it is founded.

And, of course, *must be notified* to the insurer.

Here there was no notice to the United States; and if there had been, it was not accepted by the United States. The United States could not accept it. There was no officer authorized to receive a notice or protest.

The alleged abandonment was, by the protest, alleged to be August 14, 1865; but the acting quartermaster, Colonel Metcalf, issued vouchers to claimants for *per diem* of the boat, which were paid to September 30, 1865, and here was an admission that there was no abandonment. A similar voucher was issued from October 1 to November 30, both parties treating the boat as in service. And if there had been any purpose to abandon the boat, neither party acted on it until its final destruction, and therefore no right was lost.

Parsons says if the ship-owner abandons—

He tenders thereby an absolute transfer to the insurers, and if they accept—expressly, or by implication—this makes the transfer irrevocable. The insurers may waive their right; *they may consent to the revocation of the abandonment.* (2 Marine Law, 413.)

The boat was in the service of the Government, under a contract for a return trip.

If the ice freshet had not destroyed the boat, it would have been completed. The crew was sent up the Missouri River in the spring of 1866, for the purpose of completing it. All parties treated the contract as subsisting up to that time. If it had been completed no question would have been raised against the right to pay for the use of the boat during the whole time.

All this gives construction to the intention of the plaintiffs. It is *contemporaneous construction*, the highest form of evidence. And it must be remembered that the payment for the boat *proves* that she was, on and up to the 15th of April, in the *actual service of the United States.* There was, therefore, no abandonment.

IV.—DEMURRAGE.

The Attorney General, in his brief, says:

This is a claim for demurrage; and the delay being caused not by the act of the hirer, the claim cannot be sustained. (*Douglass* vs. *Moody*, 9 Mass., 554. Abbott on Shipping, 383, 393, citing *Jamieson* vs. *Laurie*, 6 Brown, par. C., 472, 2d ed.)

The Court of Claims decide the case upon a different ground—one which seems not to have been made or relied on by the Government, and incidentally remark that the United States "are not liable to demurrage" after the 10th or 14th of August. There are two things to be said about this: First, this is not a claim for *demurrage;* and, secondly, if it *is*, the plaintiff's right to recover it is clear.

Demurrage is delay and pay for delay in loading or unloading the cargo before or during or after the voyage, or in waiting for convoy—when during the voyage—of course, to load or unload intermediate freight. But demurrage ceases when a ship sails, and cannot begin until there is delay in loading or unloading, or waiting for convoy. But there is no question of demurrage where the delay is merely in pursuing the voyage.

Bouvier says:

Demurrage, maritime law.—The freighter of a ship is bound not to detain it beyond the stipulated or usual time, to load or to deliver the cargo, or to sail. The extra days beyond the lay days (being the days allowed to load and unload the cargo) are called the days of *demurrage;* and that term is likewise applied to the payment for such delay; and it may become due, either by the ship's detention, for the purpose of load-

ing or unloading the cargo, either before or during or after the voyage, or in waiting for convoy. (3 Kent. Com., 159; 2 Marsh, 721; Abbott on Shipping, 192; 5 Com. Dig., 94 n. 505; 4 Taunt., 54, 55; 3 Chit. Comm. Law, 426; Harr. Dig., Ship and Shipping, VII.)

The general rule is that the merchant or freighter is *liable for the delay*, but to this rule there are *exceptions*.

One of the exceptions is where the delay is by *capture;* there the misfortune falls on the ship-owner. This is all that is proved by *Douglass* vs. *Moody*, (9 Mass., 548,) cited before the Court of Claims.

In that case it was held that—

A covenant in a charter-party to pay for demurrage applies only to a detention voluntary on the part of the hirer of a vessel and not a detention by capture.

The next case cited before the Court of Claims is *Jamieson* vs. *Laurie*, (6 Brown's Parliamentary Cases, 474,) which only decides that "demurrage ceases on the day of the sailing," and that, *in a case where there was no agreement to pay for a voyage by the day, month, or other time*, the freighter was not liable for delay by the freezing up of the ship.

The case was this:

Plaintiff, in July, 1787, directed Anderson, master of ship Bell, *without charter-party*, to sail from London to Cronstadt, and there take on a load of tallow, and sail from there before September 1. There was no contract made for freight; it was left to a *quantum meruit*. The ship was detained at Cronstadt, waiting on a house there to furnish the tallow, till in October.

On the 19th of August, Anderson took a protest against the house which was to furnish the tallow, for charges, damages, and detention.

The ship was loaded and put to sea October 16, and after several days put back on account of contrary winds, and was frozen up and detained till May, 1788, after which she completed her voyage, at a loss to plaintiff by the delay of £1,200. Other ships which sailed later in October made the voyage without delay.

Demurrage was claimed of Jamieson for delay before lading, and for delay after lading by winds and frost.

The freight was amicably settled, but the demurrage was contested.

The court held that—

By the custom of merchants, *the demurrage of a ship ceases on the day of the sailing* from the port of her lading, and if a ship afterward puts back by contrary winds, and is detained, the same is considered a *casus fortuitus* that must affect the owners of the ship, and not the freighters by whom she was hired.

But where the claim is for *demurrage* proper—delay in loading or unloading—the freighter *is responsible for the vicissitudes of the season.*

The general rule laid down is—

That if the merchant covenants to do a particular act—unload a ship—which it becomes impracticable for him to do, he must answer for his default. (Abbott on Shipping, 307.)

Abbott says that *Randall* vs. *Lynch* "is a leading case upon this point." (Shipping, 307.)

In that case the unloading of a ship was delayed by the crowded state of the London docks.

Lord Ellenborough held that the detention of the ship arising from the inability of the London Dock Company to discharge her was, in point of law, imputable to the *freighter;* that the person who hires a vessel must be considered as detaining her, if at the end of the stipulated time he does not restore her to the owner.

And he said:

He is responsible for all the various vicissitudes which may prevent him from so doing. While the goods remained on board the vessel in the London docks, it was impossible for the plaintiff to make any use of her; and to all intents and purposes she was there detained by the defendant.

When she was brought into the docks all had been done which depended on the

plaintiff, and the Dock Company were the defendant's agents for the delivery. The defendant was as much responsible for a delay, arising from the want of a berth, as if it had arisen *from tempestuous weather*, or any cause.

The principle so decided applies equally to the case now before the court. The Government stands in the place of the *charterer* of the boat, bound to return her, with the aid of the crew, to St. Louis, and delay "from tempestuous weather or any cause," as being blown aground, is imputable to the charterer.

In 1 Parsons's Maritime Law, 264, 265, it is said:

And if principles assumed to be law in the modern cases are to be adopted, we should say that *delay from the elements, as frost, or tempest, or tide*, or from *any act of government*, or from any positive and certain disability of the consignee, although it could not be in any way imputed to his own fault—that is, neither to his own act nor to his own *neglect—should give claim to demurrage*. But the parties may stipulate that the charterer shall be liable for no delay which is not caused by his own default.

I now proceed to consider the last point made against the right to recover.

OBJECTION III (*c*.)

1. It is said by the Attorney General's brief that—

The loss of hire as complained of by the appellants did not terminate with the destruction of the steamer, April 15, 1866; according to their theory it continued certainly till the value of the steamer was *restored* to them.

The plaintiffs have made no such claim. If they have relied on any proposition as law which inevitably leads to that result I am not aware of it, and it is not pointed out. If they had, the proposition, if law, would give more than they ask, and if not law it would support no claim.

2. But says the brief:

Freight, whether payable by bulk, weight, or time, is carried only by performance of the voyage, by carriage of the goods; here the return voyage, though fully paid for, was never performed.

It is a sufficient answer to this to say that whatever may be the *general* rule on an agreement to receive pay for carrying goods to a destined port, this rule does not apply when a ship is *chartered* by the day, as in this case, and where there is no agreement to perfect a voyage and accomplish the conveyance of goods.

The authorities show this. The general rule is stated by Abbott:

The contract for the *conveyance of merchandise* is in its nature an *entire contract*, and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labor expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. (Abbott on Shipping, 406, 1 Parsons Maritime Law, 148, note; 3 Sumner, 542; 10 East., 378–394.)

One error seems to run through the whole defense, that the plaintiffs stand in the position of *ordinary carriers*.

But if they are so, the contract here relied on varied from that which the law generally implies from voluntary agents to *carry goods*.

It varies in this, that on the return trip no goods were to be carried; none could be, owing to the low stage of water. And whatever would be the general operation of law, Abbott says:

It is competent to the parties to a charter-party to covenant by express terms in such manner as to control the general operation of law * * * or by words not express but sufficiently intelligible. (Shipping, 406.)

And this has been done.

Again he says:

Chief Justice Holt, in his elaborate argument on the law of bailments, distinguishes the contract made for the carrying of goods from the contract of *letting for hire*. (P. 342.)

And here the Government chartered the boat and crew; the arrangement was a letting for hire.

But as to the *general rule* to which I have referred there are cases to which it *does not apply*, and cases which are *exceptions to the rule.* (1 Parsons Maritime Law, 165, 258.)

Here the rule does not apply.

1. The *reason* of the rule is "that the merchant will in general derive no benefit."

That reason does not apply here.

"Freight," says Bouvier, "is the sum agreed on for the hire of a ship, entirely or in part, *for the carriage of goods from one port to another*, (13 East., 300, note;) but in its more extensive sense it is applied to all rewards of compensation paid *for the use of ships.*"

Here there was no "carriage of goods" required for a return voyage.

But the objection is, "*the return voyage was never performed.*"

This concedes that there *was a contract to pay for a return voyage;* but it is assumed that the failure to perform it fully by a return to St. Louis defeated the plaintiffs' right to recover on the contract, or on a *quantum meruit.* In other words, the defense is made that there was a contract to make an outward and return voyage, and *its completion is a condition precedent* to the plaintiffs' right to recover.

2. But its final completion is not a condition precedent when the United States *have no interest in the completion*, and *lose nothing by its non-completion.* The return to St. Louis was a part of an entire contract for the *benefit of plaintiffs'* to secure pay for the time their boat was prevented from being otherwise employed.

And now for the law.

At common law, this doctrine of dependent and independent covenants sometimes works great hardship, if not injustice. But, as applied to contracts relating to shipping, it is seldom laid down without a distinct and adequate reference to the intention of the parties, and the actual justice of the case. Indeed, it may almost be said that there is a presumption of law, for there is certainly a strong disposition of the courts against such a construction of a covenant or promise as would make it a condition precedent. For it is obvious that the construction which disconnects the promises, and obliges each party to satisfy the other for so much of his promises as he has kept, saving, however, his right to indemnity for any promises which are broken, would, in the vast majority of cases, do justice, and complete justice, to both parties." (1 Parsons Mar. Law, 272.)

3. Then, again, the completion of the return trip was rendered impossible by the ice freshet of April 15, 1866—by the *act of God.* In such cases the plaintiffs are entitled to recover the *contract price* for all the time their boat was in the Government service. There is no question of *recoupment* of damages here.

Even a carrier, says Abbott—

Is in general excused for a non-performance of the contract on his part by any event falling within the meaning of the expression *act of God and the King's enemies.*

Dermott vs. *Jones*, 2 Wallace, 7, Swayne, J., said:

It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. (2 Smith's Leading Cases, 44.)

In such case the plaintiff may recover as far as he has performed. It is an independent covenant. (2 Smith's Leading Cases, 25.)

Whether these are to be regarded as cases not falling within the general rule, or as exceptions to it, is not material.

4. The right to recover in this case might fall within another illus-

tration of these same rules, which is that where even "the contract is entire, yet," when—

The compensation is payable by installments at certain periods, as a week, month, or quarter, according to the kind of service, * * the servant may recover a ratable recompense for what service he has rendered, and the master will have his cross-action for breach of the entire contract. (2 Smith's Leading Cases, 47; 2 Parsons on Contracts, 32, 54, 520: Apportionment of Contracts.)

Here the compensation was payable by the day, and the plaintiffs can recover, just as a laborer can recover on an entire contract for a fixed time of service, where the wages are payable daily or monthly.

The authorities cited by the Attorney General are, *The Ship Nathaniel Hooper*, 3 Sumner, 554, 565; *Brown* vs. *Hunt et al.*, 11 Mass., 45; *Hooper* vs. *Perley*, 11 Mass., 547.

The case of *Brown* vs. *Hunt*, 11 Mass., 46, illustrates one of the *exceptions to the rule*, which is also discussed in Abbott, 463, under the head of "entire, divided, and intermediate voyages," but has no application to the facts here.

By a deed of charter-party the hire of the vessel was at an agreed price per ton per month, on a voyage from Boston to Savannah, thence to the West Indies, and back to a part of the United States, and thence to Boston. The vessel, having performed the first passages, was captured on her return to Boston by a British frigate, and burnt.

The hire was held due to the discharge of her cargo at the port from which she last sailed from Boston.

The court say: "The hirer is prevented by an inevitable accident, *a peril excepted in the contract*, from performing his contract to return the vessel to the owners, and the same event which excuses him in this particular determines the time when the freight money becomes payable, which had before been earned and become due. * * * *

"We think this a case where *the rule of distinct voyages applies.*" (11 Mass., 46.)

That case decides nothing only that a hirer of a ship, whose contract excepts the peril of capture, is relieved from paying beyond the contract.

See Abbott, 307, 308, 310, 414; *Spofford* vs. *Dodge* 14 Mass., 66; 2 Campbell, 356, and 12 East, 197; *Randall* vs. *Lynch*.

The delay by grounding does not defeat the action.

The *general rule* is as stated, that freight can only be recovered on a contract *for the conveyance of merchandise* by the performance of the voyage and the delivery of the goods. And there are authorities to show that in such case the ship-owner is not excused by reason of gales, or war. Abbott, 595 and 406, note.

I have already shown that the case of these plaintiffs is *not within* or is an *exception* to the general rule, made so, because there was no return freight to carry, and by reason of the special character of the contract. The plaintiffs, therefore, are entitled to recover.

For how much time can plaintiffs' recover?

But for how much time?

The contract was not for bulk, weight, or (as finally modified by the circumstances) for the whole trip, but *by the day* for all *time employed.*

In such case the law is clear. Abbott says:

But if the merchant engage to pay a certain sum for every month, week, or other portion of the voyage, in this case *the risk of the duration falls upon the merchant;* and if no time be fixed for the commencement of the computation, it will begin from the day

on which the ship breaks ground and commences the voyage, and will continue *during the whole course of the voyage*, and during all unavoidable delays not occasioned by the act or neglect of the owners or master, or by such circumstances as work a suspension of the contract for a particular period. (Shipping, p. 413; Beale *vs.* Thompson, 3 B. & P., 405. And see Dernott *vs.* Jones, 2 Wallace 7; 2 Smith's Leading Cases 25.)

The analogy of the law of wages comes to our aid. It is a "maxim that freight is the mother of wages," but Parsons says this "does not apply to the case of the master, and the owners of the vessel are liable to him for wages in case of capture or *shipwreck* to the time of the dissolution of the contract." (2 Parsons's Maratime Law, 591; Hawkins *vs.* Twigell, 5 Ellis & B., 883, 34 Eng. L. & Eq., 195.)

But now to return to the question of time.

Cases are cited by Abbott to illustrate the rule very similar to plaintiffs' case here.

In *Havelock* vs. *Geddis*, 10 East., 555, and *Ripley* vs. *Scaife*, 5 B. & C., 167, on contracts to pay for time, the time consumed in necessary repairs during a voyage of a ship sufficient at the outset was recovered.

In *Moorson* vs. *Greaves*, 2 Campb., 627, pay was recovered for the time a ship was detained by the cruisers of a blockading fleet, and Lord Ellenborough said:

> The freighters were answerable for the detention in the same manner as if it had arisen from *contrary winds* or from an embargo.

And so in case of detention by a hostile force. (*Spofford* vs. *Dodge*, 14 Mass., 66; Abbott, 595.)

And so in case of an embargo. (*Penny* vs. *New York Ins. Co.*, 3 Caines, 155.)

Spofford vs. *Dodge*, 14 Mass. 66. A part of the syllabus says:

> A vessel was chartered for a voyage at a certain hire by the month, so long as she should be continued in the service of the hirers, who were to victual and man the vessel, and pay all port charges. In the passage home she was captured as prize and detained several months, but was finally restored, and arrived at her port of destination. The owners were entitled to the hire as stipulated by the charter party, without any deduction for the time of the detention in consequence of the capture.

And the court, in deciding the case, say:

> The application of these principles has never been doubted, when the ship *has been driven out of her course by a tempest, or delayed by adverse winds;* and they have been applied, as before mentioned, when she has been detained by an embargo. We can perceive no difference as regards this question, between a delay arising from any of those causes, and that which has occurred in the present case. Here was a hostile seizure of the ship. This might have been followed by a condemnation as prize, which would undoubtedly have dissolved the contract of affreightment. (*Hooper* vs. *Perley*, 11 Mass., 547; 14 Mass., 71.)

And Parsons says:

> If the voyage for which the vessel is chartered be, as it often is, a double voyage—that is, a voyage out and home—the question occurs whether any freight is due if the vessel safely performs the outward voyage and delivers her cargo, but is lost before her return home. It is perhaps impossible to give any general rule which shall always answer this question, because each case must be judged of by itself; and these cases, as they are presented in the books, often involve questions of mingled fact and law, which are sometimes of great difficulty. There is nothing to prevent the parties from making such a bargain on this point as they choose to make. (1 Maritime Law, 258.)

NO. 225.—THE UNITED STATES, APPELLANTS, VS. WILLIAM H. REID AND OTHERS.

THE CLAIM FOR SERVICES AND EXPENSES OF CREW.

And now, as to the claim for time, services, and expenses of the crew sent to recover and return the boat in April, 1866. The boat went

aground July 26, 1865. The facts, as found by the Court of Claims, show that:

> All efforts to get her off proved unavailing. After making all the effort that was deemed advisable, and finding it impossible to get her off *until a rise should occur in the river*, the officers and crew left her, leaving several persons in charge. The crew left her on the 31st of July, 1865, leaving on board one engineer, one mate and three watchmen, who were to take care of the boat. The officer in command at Fort Rice also detailed and sent a military guard to protect the boat. * * * * On the 3d of April, 1866, the claimants dispatched a pilot and crew up the Missouri River from St. Louis to where the boat was aground to get her afloat upon the rise of the river *and bring her down to St. Louis*. These persons arrived at where the boat had been aground about the 18th day of April, 1866, and after the boat had been destroyed by the flood and ice. These persons were sent *after consultation with the quartermaster at St. Louis*, and for the purpose of protecting the interests of the United States as well as those of the claimants. The just and necessary expense incurred in these efforts to save the boat amounted to the sum of two thousand five hundred dollars.

To understand the relations existing between the Government and the plaintiffs, it should be noticed—

1. On the 31st July, 1865, the crew left the boat in care of a military guard, with the approval of the military officers, to save expense, intending, however, "*to get her off*" when "*a rise should occur in the river*" in the spring.

2. The crew was sent out in April, 1866, "*after consultation with the quartermaster at St. Louis*, and for the purpose of protecting the interests of the United States as well as those of the claimants;" that is, the crew was sent up to return with the boat to St. Louis.

3. The boat was "actually employed in the service of the United States" April 15, 1866, and the destruction of the boat "was without any fault or negligence on the part of the owners."

As to the services and expenses of the crew, here are all the elements of an *implied* if not an express contract by the Government to pay for them. They were rendered and incurred at the *instance and request* of the proper military officer, or with his sanction, and this was in pursuance of the *preëxisting* arrangement made when the crew left the boat July 31, 1865, and the *original purpose* of the voyage. If the crew had succeeded in returning the boat to plaintiffs at St. Louis, could any question have been made as to the liability of the United States to pay? The services of the crew were only *suspended* during the winter; they had not abandoned the service.

The argument and authorities already made show the right to recover this claim.

But it may be proper to notice the points made by the Attorney General.

I.

The first point is, that no contract is proved or alleged. I submit it sufficiently appears. It is *too late* now to make any objection to the insufficiency or want of allegation in the petition which should have been made in the Court of Claims. But the petition sufficiently avers it. It avers the expectation of getting the boat off in the spring, the sending of the crew in April, and "that it was in this view and with this expectation that the party was organized and sent."

This refers to a view and expectation, and therefore approval of the proper military officers as the context shows.

II.

The next objection is that—

If the United States were in any way liable to pay this amount, it would be as a part of the value of the vessel.

This objection is without any evidence to support it. The plaintiffs' claim is entirely distinct from the value of the vessel.

Suppose the boat had been got off and had run to St. Louis, and there, on entering the port, destroyed; the Government would have been clearly liable for the boat, and for the services of the crew, as distinct demands.

If the long time, from July 31 to April 15, had been consumed in slowly navigating the shallow river, clearly no objection could be raised to plaintiffs' right to pay. Yet here services were rendered growing out of a delay for causes equally beyond the control of plaintiffs.

III AND IV.

The third and fourth objections rest on the same erroneous assumption as the second, and fall with it.

These objections are, that the act of March 3, 1849, declares that "the claims provided for under that act *shall be adjusted by the Third Auditor*," and as that act gives pay for the value of the boat in case of loss, all collateral claims are excluded.

This action is not for the *value* of the boat. If it was, the remedy in the Court of Claims is *cumulative*, so on general principles of construction. (See acts regulating jurisdiction Court Claims, and Sedgwick on Statutory Construction, Cumulative Remedies.)

V.

The last objection is that this is a claim for *salvage*, for which the United States, as insurers, are not liable. (1 Park on Marine Ins., 215.)

The answer to this is that this claim is valid, independently of the law of *salvage*.

It is for services rendered at the request or with the sanction of the Government, and for its benefit. This has been sufficiently shown.

There is nothing in the act of July 4, 1864 (13 Stat., 381) to take these demands out of the jurisdiction of the Court of Claims. These claims have no connection with the suppression of the rebellion.

Neither is the jurisdiction affected by the act of March 3, 1849, (9 Stat., 415.)

This, and the acts giving the Court of Claims jurisdiction, are statutes *in pari materia*, to be construed together, and all in force.

Jurisdictional acts are to be liberally construed

The remedies are cumulative.

aground July 26, 1865. The facts, as found by the Court of Claims, show that:

> All efforts to get her off proved unavailing. After making all the effort that was deemed advisable, and finding it impossible to get her off *until a rise should occur in the river*, the officers and crew left her, leaving several persons in charge. The crew left her on the 31st of July, 1865, leaving on board one engineer, one mate and three watchmen, who were to take care of the boat. The officer in command at Fort Rice also detailed and sent a military guard to protect the boat. * * * * On the 3d of April, 1866, the claimants dispatched a pilot and crew up the Missouri River from St. Louis to where the boat was aground to get her afloat upon the rise of the river *and bring her down to St. Louis*. These persons arrived at where the boat had been aground about the 18th day of April, 1866, and after the boat had been destroyed by the flood and ice. These persons were sent *after consultation with the quartermaster at St. Louis*, and for the purpose of protecting the interests of the United States as well as those of the claimants. The just and necessary expense incurred in these efforts to save the boat amounted to the sum of two thousand five hundred dollars.

To understand the relations existing between the Government and the plaintiffs, it should be noticed—

1. On the 31st July, 1865, the crew left the boat in care of a military guard, with the approval of the military officers, to save expense, intending, however, "*to get her off*" when "*a rise should occur in the river*" in the spring.

2. The crew was sent out in April, 1866, "*after consultation with the quartermaster at St. Louis*, and for the purpose of protecting the interests of the United States as well as those of the claimants;" that is, the crew was sent up to return with the boat to St. Louis.

3. The boat was "actually employed in the service of the United States" April 15, 1866, and the destruction of the boat "was without any fault or negligence on the part of the owners."

As to the services and expenses of the crew, here are all the elements of an *implied* if not an express contract by the Government to pay for them. They were rendered and incurred at the *instance and request* of the proper military officer, or with his sanction, and this was in pursuance of the *preëxisting* arrangement made when the crew left the boat July 31, 1865, and the *original purpose* of the voyage. If the crew had succeeded in returning the boat to plaintiffs at St. Louis, could any question have been made as to the liability of the United States to pay? The services of the crew were only *suspended* during the winter; they had not abandoned the service.

The argument and authorities already made show the right to recover this claim.

But it may be proper to notice the points made by the Attorney General.

I.

The first point is, that no contract is proved or alleged. I submit it sufficiently appears. It is *too late* now to make any objection to the insufficiency or want of allegation in the petition which should have been made in the Court of Claims. But the petition sufficiently avers it. It avers the expectation of getting the boat off in the spring, the sending of the crew in April, and "that it was in this view and with this expectation that the party was organized and sent."

This refers to a view and expectation, and therefore approval of the proper military officers as the context shows.

II.

The next objection is that—

If the United States were in any way liable to pay this amount, it would be as a part of the value of the vessel.

This objection is without any evidence to support it. The plaintiffs' claim is entirely distinct from the value of the vessel.

Suppose the boat had been got off and had run to St. Louis, and there, on entering the port, destroyed; the Government would have been clearly liable for the boat, and for the services of the crew, as distinct demands.

If the long time, from July 31 to April 15, had been consumed in slowly navigating the shallow river, clearly no objection could be raised to plaintiffs' right to pay. Yet here services were rendered growing out of a delay for causes equally beyond the control of plaintiffs.

III AND IV.

The third and fourth objections rest on the same erroneous assumption as the second, and fall with it.

These objections are, that the act of March 3, 1849, declares that "the claims provided for under that act *shall be adjusted by the Third Auditor*," and as that act gives pay for the value of the boat in case of loss, all collateral claims are excluded.

This action is not for the *value* of the boat. If it was, the remedy in the Court of Claims is *cumulative*, so on general principles of construction. (See acts regulating jurisdiction Court Claims, and Sedgwick on Statutory Construction, Cumulative Remedies.)

V.

The last objection is that this is a claim for *salvage*, for which the United States, as insurers, are not liable. (1 Park on Marine Ins., 215.)

The answer to this is that this claim is valid, independently of the law of *salvage*.

It is for services rendered at the request or with the sanction of the Government, and for its benefit. This has been sufficiently shown.

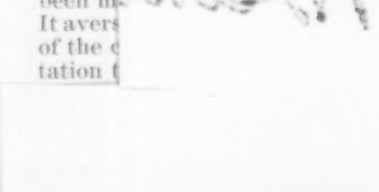
There is nothing in the act of July 4, 1864 (13 Stat., 381) to take these demands out of the jurisdiction of the Court of Claims. These claims have no connection with the suppression of the rebellion.

Neither is the jurisdiction affected by the act of March 3, 1849, (9 Stat., 415.)

This, and the acts giving the Court of Claims jurisdiction, are statutes *in pari materia*, to be construed together, and all in force.

Jurisdictional acts are to be liberally construed.

The remedies are cumulative.



In the Supreme Court of the United States.

DECEMBER TERM, 1869.

WILLIAM H. REED ET AL., APPELLANTS, *vs.* THE UNITED STATES. } No. 348.

THE UNITED STATES, APPELLANTS, *vs.* WILLIAM REED ET AL. } No. 457.

PART FIRST.

REED ET AL., APPELLANTS,
vs.
THE UNITED STATES. } No. 348.

Brief for the United States, appellees.

The appellants are seeking by this appeal to procure a reversal of a decision of the Court of Claims disallowing their claim for the sum of $15,760 hire, at the rate of $80 per day, of their steamer Belle Peoria, from September 30, 1865, to April 16, 1866.

STATEMENT OF FACTS.

On June 1, 1865, this steamer was lying at her wharf in St. Louis, Missouri, and the claimants, her owners, were applied to by Colonel Metcalf, United States quartermaster, at St. Louis, to take a cargo of military supplies to Fort Berthold, about seventeen hundred miles up the river. They, declining to undertake this voyage, on account of the lateness of the season, were told that in case of refusal the boat would be impressed; and protesting, they got the boat in readiness, took on the cargo, and she left St. Louis June 3; reached her destination July 22; started to return on the 24th, and was, while attempting to land in a high wind, blown aground on the 26th.

All efforts to get her off proving unavailing, the officers and crew, except five persons, who were to take care of the boat, left her on July 31st, reaching St. Louis August 10. These five persons, being relieved by half-breed Indians sent from a neighboring fort, on September 10 also left the boat, and reached St. Louis on September 30.

The claimants were paid the hire of their boat to August 10th, at the rate of $272 per day; thence to September 30th, at the rate of $101 per day. For the next two months vouchers were made out at the rate of $80

per day, but were never paid, and none were made out nor was any payment made for any subsequent time.

A party dispatched the next season (1866) from St. Louis by the claimants to recover the boat, ascertained that she went to pieces on April 15th of that year.

It is to be noticed that she was paid in full for all the time while she was fully manned, and in part for all the time while she was partially manned, with an additional allowance of time for the return of her men to St. Louis, the port of departure and the point of return.

After the destruction of the boat the appellants applied to the Third Auditor of the Treasury for the payment of the hire of the boat, and also of her value, as well as for a certain sum (to be treated under the cross-appeal) expended, as alleged, in efforts to recover her. Under the provisions of the act of 1849 the Third Auditor allowed the value of the boat as of the day of her taking, June 1, 1865, $30,000; and that sum was paid to the claimants. The other claims were rejected; and the claim for hire was also rejected in this suit by the Court of Claims, and rightfully, as will be shown by very brief

ARGUMENT.

I. No valid contract on the part of the United States to pay any hire of this steamer is shown in this case; and without such contract the Court of Claims is not authorized to render judgment for such hire.

II. If any contract of hire, binding on the United States, could be implied, it would be merely a hiring for the voyage up the Missouri to Fort Berthold, with allowance (at most) of pay for a return trip to St. Louis, where other employment would be open to her.

This contract has been more than fulfilled by the government. Until the captain and major part of the crew reached (after a week spent on the wreck) St. Louis, the hire of the steamboat was paid in full. Thereafter, until the last of the crew returned thither, her hire was paid at a lower rate, corresponding with the diminution of her daily expenses, and satisfactory to the claimants.

The steamer spent on her upward voyage, from June 3d to July 22d, forty-nine days. For her return down river she was paid from July 24th to September 30th, inclusive, or sixty-nine days.

III. The return voyage was broken up by the shipwreck; that is, at latest, when the captain and most of the crew, abandoning all hope of bringing the steamer to St. Louis during the current season, left her to lie aground till the next spring.

(*a.*) The steamer was rendering no actual service to the United States on her return trip.

(*b.*) Her value was paid for as of the day when she was first taken into the service of the United States, namely, June 1, 1865.

(*c.*) The loss of hire, as complained of by the appellants, did not terminate with the destruction of the steamer, April 15, 1866; according to their theory, it continued certainly till the value of the steamer was restored to them.

This view of the case is supported by the common law of shipping. Freight, whether payable by bulk, weight, or time, is carried only by performance of the voyage, by carriage of the goods; here, the return voyage, although fully paid for, was never performed; and the appellants, with the wages of a very long return voyage, and the full value of their steamer as of the time when she began her service in their pockets, are suing to be paid her hire for over six months while she rendered no service to the government, and while her deterioration and subsequent destruction were at the government expense.

For the law, as to the contract of affreightment, see the following cases: The Ship Nathaniel Hooper, (3 Sumner, 554, 565;) Brown *vs.* Hunt et al., (11 Mass., 45.) See also, as to effect of loss of the vessel, Hooper *vs.* Perley, (11 Mass., 547.)

Even as insurers of this steamer the United States would be responsible merely for her value and not for her hire while she lay wrecked.

PART SECOND.

UNITED STATES, APPELLANTS,
vs.
REED ET AL.
No. 457.

Brief for the United States, appellants.

In this case the claimants recovered judgment for the sum of two thousand five hundred dollars, "the reasonable and just amount expended by the claimants, with the knowledge and acquiescence of the quartermaster, to save the boat and prevent her destruction;" being the expenses of an expedition dispatched from St. Louis April 3, 1866, for the purpose of getting off the steamer. From this portion of the judgment the United States appealed; and in support of the appeal the Attorney General submits the following considerations:

I. No contract on the part of the United States to pay this sum is proved or alleged; the judgment rests upon no authority of law; it is the mere arbitrary exercise of an assumed discretion in the Court of Claims to decree what the individual judges may deem just.

II. If the United States were in any way liable to pay this amount, it would be as a part of the value of the vessel; and the case shows that the claim for the value of their vessel has been adjusted and paid.

III. This adjustment was made by an officer having exclusive jurisdiction over this subject. The legal right to compensation for property lost in the service of the United States is created by the act of March 3, 1849, (IX Stat. L., 414;) and the same statute provides the mode of remedy in the following words: "The claims provided for under this act *shall be adjusted by the Third Auditor.*"

For enlargement of this provision, see act of March 3, 1863, section 5, (vol. XII, p. 743.)

Claims for the adjustment of which previous enactments had thus made special provision were not carried within the jurisdiction of the Court of Claims by the general words of the act of February 24, 1855, establishing that court, nor by any subsequent act in amendment thereof.

IV. The act of 1849 must be taken as regulating fully the subject which it treats, at least as to the basis of compensation, and it defines that basis to be the value of the article lost, thereby excluding any such collateral claim as is here in question.

V. The liability of the United States is no greater in this instance than it would be if they were insurers. As insurers, in a case like this of total loss, they would be answerable, not even for average, and certainly not for salvage; and this is a claim for salvage. (Park on Marine Insurance, vol. I, chap. VI, pp. 215, 216.)

Owners even are not liable to salvage except upon something saved.

AMOS T. AKERMAN,
Attorney General,
By THOMAS H. TALBOT,
Assistant Attorney General.

Do jurisdiction master contract

1. No Contract

13. Stat. L. 344

3. If a contract ... to carry supplies ...

11. Map. 45

11. Do. 545.

2. Mexico 27

3. Mexico 5

6 Maps 472

Voyage [illegible] Do [illegible]

Nothing save 3. No Salvage

7. M. 463

3. Map. 307.

6. Map. 515.